

ATTACHMENT A [EXCERPT]

DISAPPROVED PROVISIONS OF SB RES. 95-12 (RE: RB RES. 94-380) AND SB RES. 90-28 (RE: RB RES. 89-56)

1. **Deletion of the text of footnote #1 to Table II-1 ("Those streams not listed have the same beneficial uses as the streams lakes Reservoirs to which they are tributary."); and addition of the following provision in the text of the "Existing and Potential Beneficial Uses" chapter: *"The beneficial uses of any specifically identified water body generally apply to its tributary streams. In some cases a beneficial use may not be applicable to the entire body of water. In these cases the Regional Water Board's judgment will be applied. It should be noted that it is impractical to list every surface water body in the Region. For unidentified water bodies, the beneficial uses will be evaluated on a case-by-case basis."* [SB Res. 95-12]**

Under the amended language, it is not clear which uses apply to waters not identified by name in Table II-1, nor, even for those water bodies that are identified by name, which uses apply to the entire body of water versus only certain segments. As a result, EPA is unable to determine (as required by 40 CFR 131.5) whether or not the State has adopted, for the waters within the Sacramento/San Joaquin River basins, uses that are consistent with the requirements of the CWA, and criteria that protect those designated uses. The wording of the amendment gives the impression that (1) the geographic extent of applicability of the uses already designated for any water body can be determined on a case-by-case basis simply by an exercise of judgment by the Regional Board, and may vary depending upon the situation at hand, and (2) the uses applicable to any given tributary can be designated or modified in a similar manner.

The deleted footnote (i.e., the "tributary rule"), in effect, established uses for all tributary streams not identified by name in Table II-1. The Regional Board has not demonstrated that any of those uses that were so designated as existing uses are not, in fact, existing uses (as defined in 40 CFR 131.3(e)), nor has the Regional Board demonstrated (as required by 40 CFR 131.10(g) for removal of designated uses that are not existing uses) that any of the uses that were so designated as potential uses are not attainable (as defined by 40 CFR 131.10(d)) in any of the waters covered by the tributary rule footnote. If the Regional Board wishes to remove any of the uses designated by means of the tributary rule from any waters covered by that rule, it must do so by means of a public process that fully complies with the requirements of 40 CFR 131.10. Upon completion of such a process, such waters and their amended designated uses must be identified in the Basin Plan. Similarly, to restrict the applicability of any uses that are currently designated for a water body to only certain segments of that water body, the removal of those uses from other segments of the water body must also be accomplished in accordance with the requirements of 40 CFR 131.10.

EPA recognizes that the Regional Board's interpretation of the effect of the tributary rule

may differ from that described above; however, regardless of how the tributary rule is interpreted, the State must go through a public process (see 40 CFR 131.10.(e)) in order to add or remove any uses from a water body; and, if the uses that the State wishes to designate for a given water body – tributary or otherwise – do not include the uses specified in CWA §101(a)(2), the State must conduct a Use Attainability Analysis, in compliance with 40 CFR 131.10(j), to demonstrate that the CWA §101(a)(2) uses are not attainable. The designated uses of a water body are integral components of the water quality standards for that water body, and, therefore, must be specified in the Basin Plan (i.e., the Regional Board cannot simply designate uses in the course of, for example, drafting a permit, without first adopting the uses into the Basin Plan through an appropriate public process).

To assure compliance with the CWA and applicable regulations, the State must, within 90 days of receipt of this letter, (1) clearly identify the uses designated for tributaries that are not currently identified in Table II-1, and (2) eliminate the ambiguity created by the amendment regarding the geographic extent of applicability of the uses assigned to each water body. One way in which the former can be accomplished is by deleting the amended language and restoring the tributary footnote to Table II-1. This would not preclude later modifying the uses so designated for any tributary, if appropriate, provided that such modification is accomplished in accordance with the requirements of 40 CFR 131. The latter can also be accomplished by deleting the amended language (in particular, the second and third sentences). Another option for resolving both issues would be to amend the provision to read as follows: *"[T]he beneficial uses of any specifically identified water body generally apply to its tributary streams. In some cases, a beneficial use may not be appropriate for the entire body of water and/or its tributaries. In these cases, the Regional Water Board may amend the Basin Plan to modify the use designation. Any such amendment must comply with the federal regulations at 40 CFR 131."*

2. Removal of general dissolved oxygen objectives for the Delta [SB Res. 95-12]

EPA disapproves the removal of the general dissolved oxygen (DO) objectives for waters within the legal boundaries of the Delta, which resulted from rearrangement of the text of the DO objectives. Prior to the adoption of RB Resolution 94-380, the general DO objectives, which specify percent saturation requirements, applied to all Delta waters, and constituted the only DO objectives for those Delta waters "which are constructed for special purposes and from which fish have been excluded or where the fishery is not important as a beneficial use". By rearranging the text, the Regional Board eliminated the applicability of the general DO objectives to any Delta waters, and left those water bodies "which are constructed for special purposes and from which fish have been excluded or where the fishery is not important as a beneficial use" with no DO objectives at all. It is EPA's understanding that this was an unintended result of the amendment. The State provided no rationale for the amendment other than to say, in the associated Staff Report, that the "Dissolved Oxygen" section was "reorganized for clarity".

Several aquatic life uses are designated as existing uses for the Delta. DO objectives are

needed to support those uses; therefore, the absence of DO objectives for certain waters within the Delta will not provide the level of water quality necessary to support the existing uses of those waters. With regard to those Delta waters for which specific minimum DO concentration objectives still apply under RB Res. 94-380, the State has not demonstrated that those objectives, alone, are sufficient to protect existing uses and water quality as required under the federal and State antidegradation policies. See, e.g., 40 CFR 131.12 (a)(1) and (2).

To ensure compliance with the CWA and applicable regulations, the State must, within 90 days of receipt of this letter, amend the Basin Plan to either restore the applicability of the general DO objectives to all Delta waters, or apply new DO objectives to ensure that the designated uses of all Delta waters are protected. Any new DO objectives must meet the requirements of 40 CFR 131.11 and 40 CFR 131.12. Guidance for the development of DO criteria is available in EPA's *Ambient Water Quality Criteria for Dissolved Oxygen*, which was published in 1986.